VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

WE are indebted to our obliging friend, W. P. McRae, Esq., of Petersburg, for the report, elsewhere published, of the proceedings of the Virginia State Bar Association, held at Old Point Comfort on July 5, 6 and 7, from which we were unavoidably absent.

WE make no apology for surrendering much of our space in this number to the very admirable address of Hon. George F. Hoar, delivered before the State Bar Association at Old Point. The result proves that the Executive Committee made no mistake in the selection of Senator Hoar for the annual address of 1898. We commend its careful perusal to our readers.

WORK OF THE COURT OF APPEALS AT WYTHEVILLE.—That the judges of the Virginia Court of Appeals were not on a holiday outing during their recent session at Wytheville, appears from the subjoined statement of the condition of the docket at the beginning and at the end of the term:

Cases on docket		73
Cases disposed of by final orders	50	
Cases removed to Richmond	5	
Cases not printed and not ready for trial	10	
Cases not reached	8	
		— 73

IN *Magoun* v. *Illinois Trust & Savings Bank*, 18 Sup. Ct. 594, the Supreme Court of the United States sustains, as not violative of the provision of the Fourteenth Amendment securing to all persons equal protection of the laws, the Illinois statute imposing a tax on collateral inheritances. The statute in question imposed a graded tax, the percentage increasing according to the value of the property. But the court held that this was not violative of the Constitution, since the

tax was not on the property but on the succession; and the right of succession being a creature of the law, and not a natural right, the legislature may impose conditions upon it, and may make any reasonable classification that it may see fit, provided the conditions operate equally on all persons in a particular class.

THE Supreme Court of Appeals has recently altered, in two important particulars, the rules governing examinations for admission to the bar in Virginia. Both changes are in rule 3, which we publish below, in amended form.

Under former regulations, there were four examinations held annually—two at Richmond (in November and March) and one each at Wytheville and Staunton. Hereafter there will be but a single examination held in Richmond, and this will be at the January term. The examinations at Wytheville and Staunton will be held as heretofore. The other change made is in the provision that an applicant who has failed to pass at one examination shall not be eligible at the next succeeding examination. The purpose of this is to compel a disappointed candidate to take plenty of time to prepare himself after one failure, and to incite him to greater diligence in the preparation, by the knowledge that failure means six months or more of delay in being admitted. The amendment seems to be a wise one. But since it was promulgated after the Wytheville examination, we venture to suggest that the court should not so apply the rule as to exclude from the next examination at Staunton those applicants who failed at Wytheville—as doubtless many of these would have postponed their application, and taken more time for preparation, had they received notice that failure meant exclusion from the succeeding examination.

Rule 3, as amended, reads as follows:

"3. An annual examination will be held at each place of session of the court as follows: At Richmond on the first Friday of the January term; at Staunton on the first Friday of the September term; and at Wytheville on the first Friday in July. No examination of any applicant will be made at any other time than on the days herein named; and any applicant who has failed to pass at an examination will not again be eligible until after the next succeeding examination."

The full text of the rules, prior to this amendment, may be found in the 93d volume of the Virginia Reports, and in 2 Va. Law Reg. 910; and forms of application, recommendation, etc., in 3 Va. Law Reg. 152. The amendment calls for no change in these forms. Copies of examination papers were published in 2 Va. Law Reg. 774, and in 3

Id. 315 and 465. We publish elsewhere in this number a copy of the questions propounded to the candidates at the recent examination at Wytheville. We think the bar will not complain that the court is becoming too lenient. The examination appears to us to have been more difficult than any that have preceded it, yet we believe no lawyer who has the interest of the profession at heart, and who is in sympathy with the recent beneficent legislation on this subject, will criticise the test as too severe, or will fail to cordially endorse the evident purpose of the court to do its full duty in the premises.

Out of tenderness for the feelings of disappointed applicants, the court has been heretofore averse to the publication of the names of even the successful applicants. The objection has been withdrawn, and we publish elsewhere the list of those who were admitted at the Wytheville term.

THE principle that in order to constitute a valid levy of an execution or attachment on personal chattels, there must be an actual seizure by the officer, is well illustrated by the case of *Meyer* v. *Missouri Glass Co.* (Ark.), 45 S. W. 1062. In that case the officer, finding the defendant's storehouse locked, demanded the keys, but the demand was refused. Thereupon the officer informed the defendant that he would levy upon everything in the storehouse, and would break down the doors. It was then late at night, and having no implement with which to force an entrance into the storehouse, the officer stationed himself at the door to await daylight. Subsequently another officer appeared with other writs, and to him the defendant delivered the keys. The latter officer thereupon opened the front door, went inside and announced a levy upon the entire stock, the former officer protesting that he had already levied from the outside while the doors were locked.

It was held that the former levy was ineffectual as against the latter, the court saying: "It is not sufficient for the officer to take a constructive possession, or to declare that he has taken possession and levied upon the goods, when in fact they are in a locked storehouse, to which another holds the key, and into which the officer has not effected an entrance, so that he can see the goods and ascertain their kind and quantity. *Haggerty* v. *Wilber*, 16 Johns. 287; *Rix* v. *Silknitter* (Iowa), 10 N. W. 653; *Evans* v. *Higdon*, 1 Baxt. 245; Rorer, Jud. Sales, 1005; 8 Enc. Pl. & Prac. 531."

It may be well to observe that while the method of levying an ex-

ecution on personal chattels is still regulated in Virginia by common law principles, our statutes have made material modifications in the method of levying attachments on such property.

Section 2967 of the Virginia Code provides that the writ "shall be sufficiently levied, if sued out against specified property, by serving the attachment on the defendant, or other person having possession of such property; in every other case, by serving the attachment on such persons as may be designated by the plaintiff as aforesaid" [*i. e.* by endorsement on the writ at the time of issue or by designation in writing afterwards]; "and where the defendant is in possession by service of the attachment on him." That is to say:

(1) *Where the attachment is against specified property:*

(a) In possession of the *defendant:* It is sufficiently levied by service of the writ on him.

(b) In possession of a *third person:* Service on such third person is sufficient.

In neither of these cases, nor in those mentioned below, is it necessary that the officer take possession of, or even see, the property, in order to constitute the levy a valid one.

(2) *Where the attachment is not against specified property:*

(a) In possession of the *defendant:* Service of the writ on him is sufficient.

(b) In possession of a *third person:* If such third person be designated by endorsement of the plaintiff on the wr at the time it is issued, or in writing by the plaintiff, at any time before the return day, as having in his possession effects belonging to the defendant—then service of the writ on such third person is sufficient.

The officer is impliedly prohibited from taking possession of the property (sec. 2968) after a valid levy, unless a bond be executed, which bond is not at all essential to the validity of the levy or the lien thereunder. (Va. Code, sec. 2971; *Henefick* v. *Caulfield*, 88 Va. 122).

Whether the provisions of sec. 2967, above referred to, are cumulative merely, and would still permit a common law levy by actual seizure, has not been judicially settled, so far as we know—but doubtless the provision that the statutory method, "shall be sufficient," leaves the common law method unimpaired.

It is clear enough that if the property is in nobody's possession—as where the owner is a non-resident and no third person has possession—

a common law levy is proper. Indeed it would seem to be the only method available. See *Dorrier* v. *Masters*, 83 Va. 459.

As to the method of levying executions, see *Bullitt* v. *Winston*, 1 Munf. 269; note to *Butler* v. *Maynard*, 27 Am. Dec. 104; 2 Freeman on Executions, 260; Herman on Executions, 161.

In *Spence* v. *Repass*, 94 Va. 716 (3 Va. Law Reg. 426), it is held that where there is a deed of trust on personal property, the equity of redemption in the grantor is not subject to the lien of an execution against him under sec. 3601 of the Code (referring to property not capable of being levied on), but must be actually levied on under sec. 3587, before any lien accrues. In other words, that the equity of redemption constitutes property capable of being levied on. The opinion cites no authority and does not discuss the question.

It is submitted with great deference that this is a departure from common law principles and from previous decisions of the Virginia courts. The general rule, to which we know of no exception, either at common law or by statute in Virginia, is that a merely equitable interest, even where certain, is not subject to the levy of an execution, and *a fortiori* where it is contingent and uncertain.

In *Claytor* v. *Anthony*, 6 Rand. 285, it was expressly ruled that the interest of the grantor in a deed of trust on personal property could not be levied on by a *fieri facias*, but could be reached only in equity. Says Carr, J: "That property [covered by the deed of trust] is fast bound for the debt of James C. Anthony [the deed of trust creditor]. If, after a fair application of it to that debt, any surplus should remain, this would be a fund to which the creditors of Trigg [grantor] ought to have resort, and could have resort; but it cannot be reached by execution, for it is an equitable and contingent interest" (p. 329). After discussing the right of the execution creditor, Green, J., in the same case, says: "The creditor whose execution was levied on this slave, mistook his remedy. That was in a court of chancery, to have the debt due on the deed of trust ascertained, the property sold, the debt paid, and the balance, if any, applied towards the satisfaction of his execution" (p. 309). Judge Cabell says: "The deed of trust executed by William Trigg, for securing the debt due by him to James C. Anthony, left in Trigg an *equitable* and *contingent* interest" (italics in original) "in the property conveyed by the deed of trust; and such an interest is not liable to execution" (p. 315).

See, to the same effect, *Coutts* v. *Walker*, 2 Leigh, 268, 280; 4

Minor's Institutes (3d ed.), 1018. In Mr. Freeman's elaborate discussion of this subject, in an editorial note to *McIlvaine* v. *Smith* (Mo), 97 Am. Dec. 303–315, the rule of the common law is said to be that no interest, merely equitable, is capable of being levied on by execution—a rule which was altered in some respects by a statute of 29 Charles II (re-enacted in some of the American States), expressly providing that equitable interests should be subject to execution. This statute has not, to our knowledge, been adopted in Virginia, although we have a statute making equitable as well as legal estates liable for the payment of debts (Virginia Code, section 2428). "Where a debtor conveys land in trust to pay his debts," says Mr. Freeman [and the principle is equally applicable to personal property], "he is entitled to any surplus that may remain after the purposes of the trust are accomplished and the debts are paid; but this equitable interest which he retains in the trust property is not of a pure and simple nature, but, on the contrary, is complex and mixed, since the creditors whose debts are to be paid by the terms of the deed are also *cestuis que trustent* thereunder; and the trust is therefore one in which the debtor has by no means the entire beneficial interest, but one in which he is jointly interested with others, who are, furthermore, the principal objects of the trust. The interest of a grantor in a deed of trust for the payment of debts is, therefore, not subject to sale on execution under the statute of 29 Charles II, or similar statutes, at least not until all the debts are paid and the surplus is ascertained." Citing *Pettit* v. *Johnson*, 15 Ark. 55; *Wilkes* v. *Ferris*, 5 Johns. 335 (4 Am. Dec. 364); *Harrison* v. *Battle*, 1 Dev. Eq. 541; *Brown* v. *Graves*, 4 Hawkes, 342; *Thompson* v. *Ford*, 7 Ired. 418; and *Claytor* v. *Anthony*, *supra*. See also *Van Ness* v. *Hyatt*, 13 Pet. 294, where it is expressly held that an equitable interest is not subject to execution, the court citing, among other cases, the Virginia case of *Claytor* v. *Anthony*. See 1 Freeman on Executions, 116.

The ignoring of previous decisions in the same jurisdiction is always unfortunate, since it leaves counsel and the *nisi prius* courts in doubt whether the departure from precedent was not a mere inadvertence, and whether the court, when the question again arises, will not follow the old rather than the new precedent. We hope, therefore, that if this question shall again arise the court will consent to re-examine it, and either expressly overrule the older cases or else return to the doctrine which these cases announce.

WE learn that the decision of the Virginia Court of Appeals, in *Pace* v. *Pace*, published in full in our July issue, has been the subject of much discussion among the members of the bar of the State, and that much diversity of opinion exists as to its correctness.

We have no difficulty in heartily concurring in the conclusion reached by the learned court.

The point decided is thus well stated in the reporter's head-note:

"The liabilities of the estate of a decedent, and the rights of his creditors are fixed by his death. If, at that time, a creditor has the right to prove against a decedent's estate a debt for which the decedent and another are bound as sureties, and subsequently the co-surety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full."

The decision is not only sustained by the authorities quoted in the opinion, but seems to us to be strictly in accordance with equitable principles.

The surety is always a favorite of courts of equity. The doctrine of subrogation is an invention of the courts for his especial protection. Wherever the creditor has a right, whether against the principal or a co-surety, the surety who satisfies the creditor is substituted to that right.

In the present case the proposition will hardly be denied that if no payment whatever had been made, Cheek, the creditor, could have proved his debt to its full amount against the estate of the deceased surety, notwithstanding the solvency of the living surety.

The contract of the two sureties with the creditor was not that each would pay his one-half of the debt, but each bound himself for the whole, and the creditor might look to either surety for the whole debt, leaving the paying surety to go against his co-surety for contribution. Hence, at the time of the death of the deceased surety, his estate was burdened with the full amount of this particular debt, along with his other indebtedness. His other creditors could not have complained if Cheek, the creditor, had proved for the full amount of his debt—any overplus beyond one-half of the debt to Cheek being compensated to the estate by enforcing contribution over against the living co-surety. In other words, while Cheek had the right to look to the estate of the deceased surety for the full amount of his debt, and to prove for that amount in the administration proceeding, the estate would ultimately pay but one-half of the amount, since contribution from the living co-surety, who was solvent, would have reimbursed the estate for any

surplus paid beyond its due proportion. Hence, at the death of the surety, with the debt still unpaid to Cheek, the other creditors in the same class with Cheek had a right to expect only such dividends as would result by calculating Cheek's debt, along with their own, at its face value, and distributing the estate ratably amongst the several claims, until at least one-half of the Cheek claim was satisfied. On the other hand, the ultimate liability of the living co-surety was measured by the balance remaining due after crediting the Cheek debt with all dividends payable out of the deceased surety's estate, on the basis of its face value, but not to exceed one-half of the debt.

If this were the situation at the time of the co-surety's death, with the debt still in Cheek's possession and unpaid, why should the living surety's position be altered for the worse, or why should the other creditors' position be bettered, by the accidental circumstance that the living co-surety, subsequent to the death of his fellow-surety, discharged the debt in full to Cheek, the creditor?

Having discharged the debt, not as a volunteer but as one bound to pay, every principle, whether of technical equity or of natural justice, demands that such payment by the living surety shall not operate to his disadvantage, but, on the contrary, shall give him every advantage which the satisfied creditor enjoyed. This is but the familiar doctrine of subrogation, in its purest and simplest form. As Cheek could have proved for his whole debt, the surety who has satisfied Cheek's debt must have the same privilege for the enforcement of any equities he has against the co-surety. He does not come into the administration of the co-surety's estate, setting up the mere equity of contribution. He stands upon higher ground, viz., contribution fortified by the superior equity of subrogation. He occupies Cheek's shoes, with every advantage attaching to his better position.

Any other decision would work a hardship upon the living surety, by increasing his ultimate liability because of his promptly discharging his duty to the creditor, by payment in full. On the other hand, the result reached works injury to no one, and does complete justice to all interests. The estate of the deceased surety is not injured, since it was ultimately bound for its one-half of the debt. Under the decision it pays no more. The other creditors of the deceased surety cannot complain; they get precisely the dividends they would have gotten had Cheek continued to hold the debt, instead of receiving payment from the living surety. It is no concern of theirs what the situation is as between Cheek and the living surety, or whether the

dividends to which the Cheek debt is entitled shall go directly to Cheek or to the surety who occupies his shoes.

The situation will be made plainer if we suppose Cheek's debt to have been one of higher dignity and a preferential claim—as one due the State or the United States, and therefore entitled, in the administration of the estate of a decedent, to payment in full before ordinary claims due to individuals. Suppose the assets of the deceased surety were barely sufficient to discharge his one-half of this preferred claim. It is clear that ordinary claims against his estate must go wholly unsatisfied. Upon payment of the preferred claim by the living surety, after the death of deceased surety, surely this circumstance would not convert the preferential claim into an unpreferred claim and relegate it to a lower class, thereby enhancing the value of the other debts in the lower class, to the injury of the paying surety. It is clear that the living surety, who had discharged the preferred claim in full, would be subrogated to the rights of the State or of the United States and would receive the full one-half due as contribution from the estate of the deceased surety, to the exclusion of claims of an inferior rank.

The same principle would apply if the Cheek debt had been secured by a lien on the deceased surety's estate. Upon payment by the living surety, he would at once have been entitled to subrogation, and the lien would have been enforced for his benefit to the extent of one-half of the debt, and to the exclusion of all unsecured debts.

The analogy between these hypothetical cases and the case actually before the court, is perfect. Cheek could have proved for the whole debt, therefore the paying surety has the same privilege, so far as necessary to obtain full contribution of one-half of the debt for which both sureties were equally bound.